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NO. 82-722

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JAMES G. LEDBETTER, *et. al.*,
Petitioners,

v.

JOE BENHAM, *et. al.*,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FORMER FIFTH CIRCUIT

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ATTORNEYS FOR RESPONDENTS

QUESTIONS PRESENTED

I. Whether a State statute is violative of the United States Constitution because it incorporates a mandatory, rebuttable burden-shifting evidentiary presumption of continuing mental illness and dangerousness at all proceedings involving the commitment and release of persons found not guilty by reason of insanity.

II. Whether a State statute is violative of the United States Constitution because it imposes upon an insanity acquittee, unlike a civilly committed person, the burden of proving that he does not meet the civil commitment criteria at both the initial commitment and release hearings.

III. Whether the Fifth Circuit Court of Appeals was clearly erroneous in its interpretation of Georgia law regarding judicial approval for the release of persons found not guilty by reason of insanity.

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STATEMENT OF THE CASE

A. THE STATUTORY SCHEME

On April 29, 1980, a class action was filed in the United States District Court for the Northern District of Georgia challenging the Georgia procedures governing the involuntary commitment and release of persons found not guilty of criminal charges by reason of insanity ("insanity acquittees"). The three named plaintiffs, respondents herein, were confined in a state mental hospital and brought the suit on behalf of "all persons who are, or will be, confined in mental hospitals pursuant to Ga. Code §27-1503 (Ga. Laws 1977, pp. 1293, 1295-1296, Section 2) following findings of not guilty by reason of insanity."

The case was subsequently certified by the district court as a class action.

The statutory provision [1] challenged by the plaintiffs must be read in conjunction with the interpretive gloss applied by the appellate courts of Georgia to the statute.[2] The statutory scheme that confronted the district court and the Fifth Circuit can be summarized as follows:[3]

Following a finding of not guilty by reason of insanity [4],

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[1] Subsequent to the entry of the court of appeals' decision, a new statute governing the commitment and release of insanity acquittees became effective. Ga. Laws 1982, p. 1476; O.C.G.A. §17-7-131, Ga. Code §27-1503 (1982 Supp.) (effective July 1, 1982). As discussed in detail *infra*, the new statute changes the basis for the court of appeals' limiting construction of the procedures governing release of insanity acquittees. The effect of this change in the law must necessarily be considered by the district court on remand and it would therefore be inappropriate for the Court to grant the writ on this issue.

[2] See, *Clark v. State*, 245 Ga. 629, 266 S.E. 2d 466 (1980); *Skelton v. Slaton*, 243 Ga. 426, 254 S.E. 2d 704 (1979); *Pitts v. State*, 151 Ga. App. 691, 261 S.E. 2d 435 (1979); *Pennewell v. State*, 148 Ga. App. 611, 251 S.E. 2d 832 (1979); *Dubose v. State*, 148 Ga. App. 9, 251 S.E. 2d 15 (1978). *Skelton v. Slaton* was a declaratory judgment action brought by a predecessor to the present Commissioner of the Georgia Department of Human Resources, petitioner herein. Former Commissioner Skelton was unsuccessful in his attempt to have Ga. Code §27-1503 declared unconstitutional by the Georgia Supreme Court.

[3] This summary is taken from the court of appeals' opinion, *Benham v. Edwards*, 678 F.2d 511, 513-514 (5th Cir. 1982) and from the district court's opinion, *Benham v. Edwards*, 501 F. Supp. 1050, 1054-1056 (N.D. Ga. 1980).

[4] Georgia Law recognizes two standards for the insanity defense. Ga. Code §26-702 codifies the "McNaughton Rule". It provides that "a person shall not be found guilty of a crime if at the time of the act, omission or negligence constituting the crime, such person did not have the mental capacity to distinguish between right and wrong in relation to such act, omission or negligence."

Ga. Code §26-703 recognizes a delusional compulsion defense. It provides that "a person shall not be found guilty of a crime when at

the trial court retains jurisdiction over the insanity acquittee and "upon a showing of good cause by the prosecutor" may order the person confined in a mental hospital for not less than 30 days. This commitment is actually for an indefinite period because the State does not initiate a hearing to determine the current mental status of the insanity acquittee. The "good cause" showing is not an actual hearing but merely a matter of statutory ritual. The district court found that only one of the 106 insanity acquittees then confined had received an evidentiary hearing prior to their indefinite commitments. *Bentham v. Edwards*, 501 F. Supp. 1050, 1055, n. 4 (N.D. Ga. 1981).

In order to secure release, the insanity acquittee or the hospital must petition the original committing court. A petition will not be entertained within the initial 30-day commitment period nor within 12 months of any prior petition. At the hearing, the sole issue is whether the insanity acquittee meets the criteria for commitment under the Georgia Mental Health Code, Ga. Code Chs. 88-5 or 88-25 [5].

Notwithstanding that there has never been a determination as to the acquittee's current mental state, the burden of proof is cast on the acquittee to show that he

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the time of the act, omission or negligence constituting the crime, such person, because of mental disease, injury, or congenital deficiency, acted as he did because of a delusional compulsion as to such act which overmastered his will to resist committing the crime."

[5] A person may be involuntarily hospitalized under the Georgia Mental Health Code if he is mentally ill and (1) presents a substantial risk of imminent harm to himself or others as manifested by either recent overt acts or recent expressed threats of violence which present a probability of physical injury to himself or other persons or (2) is so unable to care for his own physical health and safety as to create an imminently life endangering crisis [Ga. Code §88-501(v)], or if he is mentally retarded and in need of services in a residential facility [Ga. Code §88-2504].

does not meet the criteria for civil commitment. Moreover, there is an evidentiary presumption that the acquittee is both presently mentally ill and dangerous. In their petition, the defendants/petitioners characterize this presumption as "rebuttable." A more accurate description would be a mandatory, rebuttable burden-shifting presumption. It is mandatory yet rebuttable because the committing court must find that the insanity acquittee meets the commitment criteria unless he comes forth with evidence to rebut the presumption. It is burden-shifting because the presumption does not disappear once contrary evidence is produced thereby returning the burden of persuasion to the State. Moreover, because it is characterized as opinion evidence, the committing court can ignore uncontradicted medical evidence that the acquittee does not meet the civil commitment criteria and rely solely on the presumption as the basis for ordering continued confinement. 501 F. Supp. at 1070-1071. *See Clark v. State*, 245 Ga. 629, 266 S.E. 2d 466 (1980); *Pennewell v. State*, 148 Ga. App. 611, 251 S.E. 2d 832 (1979); *Pitts v. State*, 151 Ga. App. 691, 261 S.E. 2d 435 (1979); *Dubose v. State*, 148 Ga. App. 9, 251 S.E. 2d 15 (1978). Once an application for release has been denied, another cannot be entertained until one year has elapsed.

The procedures governing the commitment of insanity acquittees in Georgia differ substantially from the procedures applicable to those committed under the Georgia Mental Health Code ("M.H.C. committees"). An M.H.C. committee automatically receives an initial commitment hearing within no more than 17 days of his involuntary hospitalization unless he affirmatively waives the hearing in writing. At the hearing, the burden of proof is on the State to establish by clear and convincing evidence that

the committee meets the civil commitment criteria. No presumption of mental illness or dangerousness applies and the traditional rules of evidence govern.

If commitment is ordered, the State must recommit the individual within 6 months and at 12-month intervals thereafter. At the recommittal hearing, the burden remains on the State under the clear and convincing evidence standard and no presumption of present mental illness or dangerousness is employed. Moreover, the hospital may release the M.H.C. committee at any time without judicial approval.

The district court found as a matter of fact that as a result of the procedures established by Ga. Code §27-1503, persons not requiring psychiatric hospitalization were being involuntarily confined in state mental hospitals. For example, the district court found that by the defendants' own admission, 42 of the 106 persons confined in state mental hospitals in June, 1980 did not meet the criteria for commitment.[6]

The histories of each of the named plaintiffs also establish that persons not meeting the criteria for commitment under Georgia law were nonetheless being detained in psychiatric hospitals because of the procedures embodied in Ga. Code §27-1503. At the time suit was filed, and at the time of the district court's decision, none of the named plaintiffs met the criteria for involuntary commitment. Plaintiff Anthony had been found not guilty by reason of insanity of motor vehicle theft in September of 1979. Without any hearing, he was ordered committed indefinitely to a state mental hospital. In March, 1980 a

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[6] These findings of fact are contained in the district court's order denying the defendants' motion for a stay of the injunction pending appeal. This Order, as amended, is reproduced as Appendix One.

hearing was held before the committing court on Mr. Anthony's application for release. The attending psychiatrist and the hospital's Director of Forensic Services both testified that Anthony was not mentally ill, was not dangerous, and did not meet the criteria for civil commitment. No other evidence was presented. The court then ordered Anthony committed for not less than a year.

On May 22, 1977, Plaintiff Biddle was arrested and charged with the murder of his wife. In January, 1978 he was found not guilty by reason of insanity and committed indefinitely and without a hearing to a Georgia mental hospital. The defendants themselves thereafter petitioned the court for Biddle's release and on June 18, 1979 a hearing was held on that petition. The only evidence presented was the testimony of the hospital clinical director that Biddle was not mentally ill, was not dangerous, and that he did not meet the criteria for civil commitment. Notwithstanding, Biddle was ordered committed with the direction that no further application for release would be entertained until one year had elapsed.

On March 10, 1980, Plaintiff Benham was found not guilty by reason of insanity of burglary and theft by taking. Without any further hearing he was summarily ordered committed indefinitely to a state mental hospital. In fact, Benham had never left the hospital, even for a court appearance, after his initial commitment for evaluation two months earlier. Recognizing the near impossibility of securing release under the existing Georgia procedures, plaintiff Benham joined with plaintiffs Anthony and Biddle and filed the instant suit.[7]

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[7] Throughout the proceedings in the district court the defendants conceded that none of the named plaintiffs met the commitment criteria. Following the entry of the district court's order, the defen-

B. PROCEEDINGS BELOW

In an opinion characterized by the court of appeals as "comprehensive and scholarly" District Judge Harold Murphy granted plaintiffs' motion for a preliminary injunction, holding:[8]

1) That both the Equal Protection and the Due Process Clauses require Georgia to provide insanity acquittees with a State-initiated commitment hearing;

2) That at the initial commitment hearing equal protection and due process considerations require the State to prove the civil commitment criteria by clear and convincing evidence;

3) That the presumption of continuing mental illness and dangerousness violates both the Due Process and Equal Protection Clauses;

4) That Georgia can constitutionally require judicial approval for the release of insanity acquittees who have committed serious violent crimes but that equal protection considerations require that those acquitted of petty, non-violent offenses be treated the same as M.H.C. committees for purposes of release;

5) That at the release hearing the burden of proof cannot constitutionally be placed on the insanity acquittee;

6) That equal protection requires that insanity ac-

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dants agreed to release plaintiffs Benham and Anthony without any further judicial proceedings. Plaintiff Biddle was ordered released by the original committing court following a hearing conducted in accord with the procedures mandated in the district court's order.

[8] The preliminary injunction was granted following an evidentiary hearing and upon consideration of the defendants' answers to interrogatories and a deposition of the forensic director of one of the defendants' hospitals. The defendants presented no evidence. At oral argument before the court of appeals, the parties stipulated that no further evidence would be offered and that it was appropriate to treat the preliminary injunction as permanent.

quittees be treated the same as M.H.C. committees in terms of the frequency of their applications for release;

7) That the criteria for the commitment of insanity acquittees must include both mental illness and dangerousness and the rules of evidence that apply in hearings for the commitment of M.H.C. committees must also apply in hearings for insanity acquittees.[9]

The court of appeals substantially affirmed the district court.[10] It agreed with the district court that at the expiration of the 30-day evaluation period the state must initiate a commitment hearing where it bears the burden of proving commitability by clear and convincing evidence. The court likewise found that the presumption of mental illness and dangerousness violates the equal protection clause. And it agreed that insanity acquittees must be afforded the opportunity to apply for release with the same frequency as M.H.C. committees.

The one area where the court of appeals disagreed with the district court was on the question of the release procedures. The court of appeals found that the district court should not have reached the constitutional question of whether the State could establish one set of release procedures for all insanity acquittees and another set of procedures for all M.H.C. committees. The court found that the Georgia Supreme Court had construed the statute more narrowly than had the district court. *See*

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[9] The State did not appeal these two rulings.

[10] The defendants' motion to suspend the injunction pending appeal had earlier been denied by both the district court and the court of appeals. Defendants incorrectly characterize this motion as a "Motion to Suspend Injunction as to all State and Superior Court Judges." Petition for a Writ of Certiorari, p. 9. The district court's injunction was not directed at any judges and the defendants' motions for a stay in the district court and court of appeals made no mention of judges.

Clark v. State, 245 Ga. 629, 266 S.E. 2d 466 (1980). The court of appeals found that under Ga. Code §27-1503, at the time of the summary commitment, the trial court must make a determination as to whether the crime for which the insanity acquittee was acquitted evidences dangerousness sufficient to meet the standard for commitment prescribed by the Mental Health Code. If the crime does not evidence dangerousness, then §27-1503 does not authorize the commitment of that acquittee.

Having found that the Georgia Supreme Court had construed and limited the statute to apply only to acquittees found not guilty of crimes evidencing dangerousness, the Fifth Circuit then turned to the question of whether equal protection was violated by the State's requiring judicial approval for the release of acquittees committed under §27-1503 while not requiring such approval for the release of M.H.C. committees. Based upon the narrowed class of insanity acquittees governed by §27-1503, the court found no equal protection violation.

The court of appeals then addressed the question of the burden of proof to be employed at the release hearing. The court could discern no rational basis for placing the burden of proof on the State at recommitment hearings for M.H.C. committees and on the insanity acquittee at his release hearing. In addition, because the State has no valid interest in confining a person who is no longer mentally ill and dangerous, and because there is no discernable administrative burden on the State, the court found the rule of *Addington v. Texas*, 441 U.S. 418 (1979) to be controlling. Based on both due process and equal protection grounds, the court held that the State must bear the burden of proving continued commitability by clear and convincing evidence. The court then remanded the case

to the district court to fashion relief for those class members whose commitment is not properly governed by §27-1503 and who do not meet the civil commitment criteria for release, and for a determination of the type of criminal conduct that evidences dangerousness for purposes of initial commitment under §27-1503.[11]

REASONS FOR DENYING THE PETITION

I. SUMMARY OF THE ARGUMENT

The petition should be denied for the following reasons:

1) The decision of the Fifth Circuit on the issues of the constitutionality of the presumption of continuing mental illness and dangerousness and the allocation of the burden of proof is entirely consistent with this Court's unbroken line of decisions that recognize the importance of strict procedural protections governing the commitment of those alleged to be mentally ill;

2) There is no conflict among the Circuits because those that have addressed the issue agree with the principle that the procedures governing the commitment and release of insanity acquittees must be substantially similar to the procedures applicable to other civil committees. The Fifth Circuit merely applied that principle to Georgia's unique statutory scheme;

3) The court of appeals' interpretation of Georgia law is not a proper subject for review by certiorari. Moreover, since the entry of the decision below, a new statute governing the commitment and release of insanity acquittees has been enacted. The effect of the new statute on the interpretation of State law must be evaluated by the district court on remand.

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[11] The parties have agreed, with the approval of the district court, to temporarily hold in abeyance the determination required by the court of appeals on remand. The injunction ordered by the district court is, however, still in effect and the defendants are abiding by it. No stay of the mandate pending application to this court for a Petition for Writ of Certiorari was sought by the defendants in the court of appeals or in this Court and none has been granted.

II. ARGUMENT

A. THE COURT OF APPEALS CORRECTLY APPLIED THE DECISIONS OF THIS COURT TO GEORGIA'S UNIQUE STATUTORY SCHEME.

This Court has consistently held that commitment to a mental hospital constitutes "a massive curtailment of liberty." *Humphrey v. Cady*, 405 U.S. 504, 510 (1972); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Addington vs. Texas*, 441 U.S. 418 (1979); *Vitek v. Jones*, 445 U.S. 480 (1980). The court of appeals correctly recognized the importance this Court has placed on the procedural protections that must be accorded those alleged to be mentally ill before they can be involuntarily hospitalized and subjected to intrusive psychiatric treatment. While this Court has never explicitly dealt with the rights of insanity acquittees, the Fifth Circuit's application of equal protection and due process concepts analytically and logically follows the unbroken line of cases from this Court that evidence an acute awareness for the rights of the mentally ill.

This Court's decisions applying the Equal Protection Clause establish the clear principle that the validity of the procedures by which insanity acquittees are committed and retained in state mental hospitals must be considered in light of the procedures applicable to all other civil committees. In *Baxstrom v. Herold*, 383 U.S. 107 (1966), the Court held that equal protection bars a state from committing a prisoner who is nearing the end of his prison term without affording him procedures substantially similar to the procedures governing other civil committees. The fact that Baxstrom had committed a criminal act was insufficient to justify different treatment. The Court held that "[i]t may or may not be that Baxstrom is

presently mentally ill and such a danger to others that the strict security of a Department of Corrections Hospital is warranted. All others receive a judicial hearing. Equal protection demands that Baxstrom receive the same." *Id.* at 114-115.

In *Humphrey v. Cady*, 405 U.S. 504 (1972), the Court extended the *Baxstrom* principle to commitment under the Wisconsin Sex Crimes Act following a criminal conviction. The Court found that because the factual and legal determinations necessary for commitment under the Sex Crimes Act were essentially the same as for commitment under the Wisconsin Mental Health Act, equal protection required that the jury trial available under the Mental Health Act also be available to those committed under the Sex Crimes Act.

Then, in *Jackson v. Indiana*, 406 U.S. 715 (1972), this Court held that an incompetent criminal defendant was denied equal protection when he was committed under an Indiana statute that had a more lenient commitment standard and a more stringent standard for release than was applicable to those committed under the State's mental health code. In the opinion, the Court noted with apparent approval that "[t]he *Baxstrom* principle also has been extended to commitment following an insanity acquittal . . ." *Id.* at 724 (cites omitted).

The Fifth Circuit properly applied the equal protection principles established in *Baxstrom*, *Humphrey* and *Jackson* to the Georgia statutory scheme. As to the presumption of present mental illness and dangerousness, the court concluded "that there is no conceivable basis for applying the presumption against insanity acquittees and not against M.H.C. committees, when the factual predicate for the presumption would be stronger in the

context of M.H.C. committee hearings." 678 F.2d at 519. The court's holding that application of the presumption violates the Equal Protection Clause is entirely consistent with, and a proper application of, this Court's prior decisions.[12]

Likewise, the court of appeals analyzed the issue of burden of proof under the equal protection standards established by this Court's prior precedents. Under the Georgia scheme, the burden of proof at the initial hearing and at subsequent release hearings is on the insanity acquittee. In M.H.C. commitments the burden of proof at both initial and recommitment hearings is on the State by clear and convincing evidence. The court found that in Georgia there was no basis for concluding that insanity acquittees were somehow more dangerous than M.H.C. committees thereby justifying this difference in treatment.[13] The commitment standard is the same for both.[14]

[12] The presumption at issue in this litigation is qualitatively different from the presumption utilized by the District of Columbia Court of Appeals in *Jones v. United States*, 432 A.2d 364 (D.C. App. 1981) (en banc), cert. granted, ___ U.S. ___, 102 S.C. 999 (1982). The presumption in this case is evidentiary. It provides not only the State's rationale for placing the burden of proof on the insanity acquittee, but it also authorizes commitment in the face of uncontradicted evidence to the contrary. The *Jones* court relied on the presumption as justifying the different procedures accorded insanity acquittees and civil committees. It did not discuss the presumption's role as evidence at the actual commitment hearing. *Id.* at 374. Moreover, both the district court and court of appeals analyzed the presumption in terms of its underlying factual and scientific validity. 678 F.2d at 516-518; 501 F.Supp. at 1067-1070. The *Jones* court merely assumed the validity of the presumption without analysis and without reference to any factual basis in the record. *Jones* at 374.

[13] The literature also supports the proposition that insanity acquittees are no more dangerous than M.H.C. committees. See, Weihofen, *Institutional Treatment of Persons Acquitted by Reason of Insanity*, 38 Tex. L. Rev. 849 (1969); German and Singer, *Punishing The Not Guilty: Hospitalization of Persons Acquitted by Reason of of Insanity*, 29 Rutgers L. Rev. 1011 (1976).

[14] See, footnote 5.

Moreover, at the initial commitment hearing under the Mental Health Code there has been an evaluation period and a determination by the chief medical officer, supported by the opinions of two other physicians who have personally examined the patient, that the patient is a mentally ill person requiring involuntary treatment. Ga. Code §88-506.2(a). There is no comparable determination prior to the insanity acquittee's initial hearing. In addition, at the recommitment hearing under the Mental Health Code there has been a prior judicial determination that the individual was dangerous, yet the State still bears the burden of proof.

The findings made at the criminal trial are neither as probative nor as relevant. 678 F.2d at 523-528. The court of appeals concluded that given the facts of this case and the unique Georgia statutory scheme, there was no basis for concluding that insanity acquittees generally are more dangerous than M.H.C. committees generally. There is thus no rational basis for placing the burden of proof on one group and not on the other.

The court of appeals also followed this Court's decisions applying strict procedural protections under the Due Process Clause to the commitment of the mentally ill. *Addington v. Texas*, 441 U.S. 418 (1979); *Vitek v. Jones*, 445 U.S. 480 (1980); *Jackson v. Indiana*, 406 U.S. 715 (1972); *Specht v. Patterson*, 386 U.S. 605 (1967). In *Vitek*, the Court rejected the argument that the imposition of a prison sentence reduces the need for due process protection:

> "None of our decisions holds that conviction for a crime entitles a State not only to confine the convicted person but also to determine that he has a mental illness and to subject him involuntarily to institutional care in a mental hospital. Such consequences visited on the

prisoner are qualitatively different from the punishment characteristically suffered by a person convicted of crime. Our cases recognize as much and reflect an understanding that involuntary commitment to a mental hospital is not within the range of conditions of confinement to which a prison sentence subjects an individual. *Baxstrom v. Herold*, 383 U.S. 107 (1966); *Specht v. Patterson*, 386 U.S. 605 (1967); *Humphrey v. Cady*, 405 U.S. 504 (1972); *Jackson v. Indiana*, 406 U.S. 715, 724-725 (1972). A criminal conviction and sentence of imprisonment extinguish an individual's right to freedom from confinement for the term of his sentence, but they do not authorize the State to classify him as mentally ill and to subject him to involuntary psychiatric treatment without affording him additional due process protection." *Vitek* at 493-494.

The court of appeals followed this reasoning in holding that an individual who has been found not guilty and is therefore not subject to incarceration cannot be committed to a mental hospital without due process protections. Applying the rule of *Addington*, the court held that due process requires the State to bear the burden of proving suitability for commitment by clear and convincing evidence.[15]

Contrary to the petitioners' assertion, there is no con-

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[15] The court of appeals found it unnecessary to decide whether the presumption also violates due process because it found that the presumption clearly violates the Equal Protection Clause. However, in order for the presumption to pass muster under the Due Process Clause, it must be shown with "substantial assurance that the presumed fact is more likely than not to flow from the proved fact upon which it is made to depend." *Leary v. United States*, 395 U.S. 6, 36 (1969), accord, *County Court of Ulster County v. Allen*, 442 U.S. 140, 157-158 n. 16 (1979). The district court found that the presumption did not pass this established test. 501 F.Supp. at 1068 n.24. For a full discussion of the fallacy of the presumption, see Brief of Amicus Curiae Georgia Legal Services Program, Inc., pp. 22-41, *Jones v. United States*, No. 81-5195.

flict between any decision of this Court and the decision below. Rather, the court of appeals correctly applied the equal protection and due process standards enunciated by this Court to the unique statutory scheme under review. There is therefore no reason for the Court to grant the petition.

B. THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO THE PROPER STANDARD TO BE APPLIED IN ASSESSING THE CONSTITUTIONALITY OF STATE STATUTES GOVERNING THE COMMITMENT AND RELEASE OF INSANITY ACQUITTEES.

Petitioners' allege that the Fifth Circuit's ruling in this case conflicts with the decisions of other courts of appeals in the following cases: *Warren v. Harvey*, 632 F.2d 925 (2d Cir.), *cert. denied*, 449 U.S. 902 (1980); *Dorsey v. Solomon*, 604 F.2d 271 (4th Cir. 1979); and *Jones v. United States*, 432 A.2d 364 (D.C. App. 1981) (*en banc*), *cert. granted*, ___ U.S. ___, 102 S. Ct. 999. Each of these cases, however, recognizes and applies the same constitutional standard to the particular state scheme under review. Each case holds that insanity acquittees are entitled to commitment procedures substantially similar to the procedures applicable to those committed under the state's mental health code. *Jones* at 371;[16] *Warren* at

[16] The court in *Jones* was also confronted with the question of whether an insanity acquittee could be confined in a mental hospital for a period longer than the maximum hypothetical sentence without affording him the same procedural protections as are given civil committees. That question is not an issue in this case. However, the maximum hypothetical prison sentence should have no bearing on the procedural protections constitutionally due insanity acquittees. See, Brief of Amicus Curiae Georgia Legal Services Program, Inc., pp. 8-12, *Jones v. United States*, No. 81-5195. In addition, the validity of the procedures governing initial commitment should not have been reached by the District of Columbia Court

930; *Dorsey* at 274. Also see, *Powell v. Florida*, 579 F.2d 324, 332 (5th Cir. 1978); *Jackson v. Foti*, 670 F.2d 516 (5th Cir. 1982); and *Bolton v. Harris*, 395 F.2d 642 (D.C. Cir. 1968). Different procedures are valid only if based upon a legitimate state interest. While respondents do not necessarily agree with the results reached in those cases, any differences between the results reached can be attributed to differences between the state statutes under review.

For example, the standard for commitment varies from state to state. In the District of Columbia, the person must be "likely to injure himself or others." *Jones* at 372; D.C. Code §21-545(b). In Maryland, the dangerousness criteria includes injury to property as well as to persons. *Dorsey* at 273. Georgia, on the other hand, requires a recent overt act or recent expressed threat of violence that presents a probability of physical injury. Ga. Code §88-501(v). Thus, in Georgia, the class of insanity acquittees includes persons whose conduct does not meet the criteria for civil commitment under the State's Mental Health Code.

The Fifth Circuit in this case applied the standard enunciated in the earlier cases of *Powell v. Florida* and *Jackson v. Foti* to Georgia's unique statutory scheme. The standard employed is essentially the same as the standards employed by the Second, Fourth, and District of Columbia Circuits. Differences in result among the particular cases are based primarily upon the particulars of the various procedures under review. There is, therefore, no substantial substantive conflict among the Circuits requiring

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of Appeals. *Id.* at 6-8. Also see, Brief For The United States at 29 n. 23.

resolution by the Court.[17]

C. THE ALLEGED MISINTERPRETATION OF STATE LAW IS NOT A PROPER SUBJECT FOR REVIEW BY WRIT OF CERTIORARI.

Petitioner alleges that the court of appeals misinterpreted Georgia law in "numerous", but unspecified, ways. Aside from the correctness of the Fifth Circuit's application of State law, there are three reasons why these claimed misinterpretations are not a proper subject for review by writ of certiorari.

First, alleged errors in the interpretation of state law do not constitute "special and important reasons" justifying exercise of this Court's discretion. Sup. Ct. R. 17. The petitioners themselves apparently do not consider the issues particularly significant for they have failed even to explain the nature of the alleged misinterpretation.

Second, the petitioners failed to exhaust the appropriate remedy available to them in the court of appeals for correcting claimed errors in the interpretation of state law. Rule 16.2.4 of the Rules of the United States Court of Appeals for the Fifth Circuit,[18] provides that alleged errors in the determination of state law are properly raised by motion for rehearing before the panel that

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[17] Petitioner also alleges that the Fifth Circuit's holding that insanity acquittees must be afforded the opportunity to apply for release with the same frequency as M.H.C. committees conflicts with the Georgia Supreme Court's ruling in *Clark v. State*. The State's brief before the Fifth Circuit devoted only three sentences to this issue, 678 F.2d at 542, and the petition addresses the issue only superficially. Because there is no conceiveable basis for the difference in treatment between the two classes, this issue is clearly not appropriate for review by certiorari. *Id.*

[18] P.L. 96-452, sec. 9 provides that matters pending in the Former Fifth Circuit on October 1, 1981 shall be governed by Former Fifth Circuit procedures.

decided the case. Also see, Fed. R. App. P. 40. Petitioners did not file a motion for rehearing and should not be permitted to raise the issue at this late date.

Finally, subsequent to the decision below, a new statute governing the commitment and release of insanity acquittees became effective in Georgia.[19] The new statute may require a reinterpretation of State law by the district court on remand. The court of appeals found that the Georgia Supreme Court in *Clark v. State* had interpreted the statutory requirement of a "good cause showing" prior to commitment as mandating a determination by the trial court that the crime for which the acquittee had been acquitted evidenced dangerousness as defined by the Mental Health Code. Only those acquittees so identified could be committed under Ga. Code §27-1503. 678 F.2d at 529-531. Based upon the narrowed class of acquittees to which §27-1503 applied, the court found that requiring judicial approval for their release passed muster under the Equal Protection Clause.[20]

The new statute eliminates the "good cause" language and, arguably, the basis for the limiting construction. On remand, the district court must evaluate the new language and reinterpret the statute. It would therefore be premature for this Court to grant the Petition.

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[19] Ga. Laws 1982, p. 1476, O.C.G.A. §17-7-131, Ga. Code §27-1503 (1982 supp.)

[20] In the Questions Presented, petitioners raise the issue of whether the "statute is violative of the United States Constitution because it requires judicial approval for the release of all committed insanity acquittees . . ." Petition, p. i. The court of appeals found, however, that the statute, as construed, was not unconstitutional in requiring judicial approval for the release of those properly committed under it. 678 F.2d at 538. The issue petitioners seek to raise was actually favorable to them.

CONCLUSION

For the reasons stated herein, respondents urge the Court to deny the petition and allow the decision of the court of appeals to remain undisturbed.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

JOE BENHAM, *et. al.*, *Plaintiffs*, vs. JOE EDWARDS, *et. al.*, *Defendants.*	CIVIL ACTION NO. C80-78R

ORDER

Pending for consideration is defendants' motion to suspend the injunction (entered by this Court on November 14, 1980) pending appeal to the Fifth Circuit Court of Appeals. Following an oral hearing on the matter, and considering the prior hearing on the motion for the preliminary injunction held on August 25, 1980, and the evidence in the record, the Court makes the following findings of fact:

A.

1. As of June 24, 1980, only one of the 106 individuals then confined to hospitals pursuant to Ga. Code §27-1503 had been afforded an evidentiary hearing prior to his indefinite commitment. [Defendants' Answers to Plaintiffs' Interrogatories #3(a)]

2. As of June 24, 1980, 42 of these 106 individuals did not, in the opinion of the hospital superintendent or other person in charge of their treatment, meet the criteria for civil commitment under Ga. Code Chs. 88-5 or 88-25. [Defendants' Answers to Plaintiffs' Interrogatories #10(a)]

3. As of June 24, 1980, applications for release pursuant to Ga. Code §27-1503 had been filed by hospital

superintendents on behalf of 26 of the 106 committed individuals. [Defendants' Answers to Plaintiffs' Interrogatories #9]

4. As of June 24, 1980, 5 individuals, who in the opinion of the hospital superintendent or other person in charge of their treatment did not meet the criteria for civil commitment under Ga. Code Chs. 88-5 or 88-25, had been denied release upon an application made pursuant to Ga. Code §27-1503. [Defendants' Answer to Plaintiffs' Interrogatories #10(c)]

5. Of the 181 persons who had been committed and released between April 8, 1977 and June 24, 1980, 149 were released upon application of the hospital superintendent. [Defendants' Answers to Plaintiffs' Interrogatories #7]

6. As of June 10, 1980, at least 4 of the 11 persons then confined at the Northwest Georgia Regional Hospital pursuant to Ga. Code §27-1503 did not meet the criteria for civil commitment under Ga. Code Ch. 88-5. [Deposition of Dr. Timothy Bullard, p. 28]

7. As a result of court orders entered pursuant to Ga. Code §27-1503, the defendants have had to confine persons who are not in need of involuntary psychiatric hospitalization. [Deposition of Dr. Timothy Bullard, pp. 27-28]

8. There is no difference in the care, course of treatment or privileges given insanity acquittees and mental health code committees in state mental hospitals by the defendants except as to discharge from the hospital or release to a less restrictive setting. [Deposition of Dr. Timothy Bullard, pp. 14-21]

9. No showing of potential financial injury, undue

burden on the state judicial system or effect on the care and treatment of the mentally ill resulting from the denial of a stay pending appeal has been shown by the defendants.

10. The defendants will not suffer irreparable injury if the preliminary injunction remains in effect during appeal.

11. Both present and prospective members of the plaintiff class will suffer irreparable injury if the preliminary injunction is stayed pending appeal.

12. No valid public interest will be served by granting a stay pending appeal.

B.

The Court indicated at the oral hearing this morning that the State will be afforded an opportunity to request this Court to extend the time period for compliance with the injunction. The motion to suspend the injunction pending appeal, however, is denied.

C.

Both parties have indicated some confusion with Part III G of the November 14 Order concerning the transfer of patients who are committed following findings of not guilty by reason of insanity. To aid the parties in interpreting that section of the order, it should be sufficient to quote from that section:

> For all insanity-acquittees who were charged with crimes other than those involving serious violent acts, the equal protection clause requires the same procedure as that afforded all M.H.C. committees.

If M.H.C. committees must obtain Court approval for conditional release, then the State may impose the same

requirement on insanity-acquittees. Ga. Code §88-506.2. Similarly, if no approval from the Court is required for hospital-to-hospital transfers, then that cannot be a requirement for insanity-acquittees.

ACCORDINGLY, defendants' motion to suspend Injunction Pending Appeal is DENIED.

SO ORDERED, this the 22nd day of December, 1982. [as amended by Order dated December 29, 1982.]

/s/ HAROLD L. MURPHY
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I, Robert B. Remar, counsel of record for the respondents and a member of the Bar of the Supreme Court of the United States, hereby certify that in accord with Rule 28 of the Rules of the Supreme Court of the United States, I have served three copies of the within and foregoing brief in opposition upon the petitioners by depositing same in the United States mail, with sufficient first-class postage thereon, and addressed to counsel for petitioners as follows:

Carol Atha Cosgrove
Senior Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334.

I further certify that all parties required to be served have been served.

This 23 day of November, 1982.

Robert B. Remar